No. 87-83

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF PITTSBURGH, PENNSYLVANIA,
PAUL J. IMHOFF, Superintendent of the Pittsburgh
Bureau of Building Inspections, and
ROBERT J. LURCOTT, Director of the Pittsburgh
Department of City Planning,

Petitioners,

vs.

DENNIS SULLIVAN, MICHAEL DISKIN, JAMES ROSEWEIR,
HERSHEL HEILIG, WAYNE JACKSON, JOHN CLARK and
JOHN KING, on their own behalf and on behalf
of all others similarly situated, and
ALCOHOLIC RECOVERY CENTER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION

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Constitutional Provisions and Statutes:

Supplemental Statement of the Constitutional and Statutory Provisions Involved

Amendment XIV, Sections 1 and 5, of the United States Constitution provides in relevant part as follows:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, 29 U.S.C. §794 (1986) provides in relevant part as follows:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

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Counter-Statement of the Case

The Petitioners, City of Pittsburgh, *et al.* (hereafter "City"), understate the claims of the Respondents, who were the Plaintiffs before the District Court and will be referred to as "Plaintiffs" hereafter. The District Court found that for approximately a twenty-two month period prior to filing suit in May, 1985, the City had engaged in a pattern and practice of deliberate discrimination against Plaintiffs which caused irreparable harm and threatened to cause further such harm. (Findings of Fact 25, 38, 39, 64 and 68-86 (hereafter F-25 etc.), set out in Appendix B to the Petition for Certiorari and 620 F.Supp. 935 (W.D. Pa. 1985)). The District Court's findings of fact have not been disputed.

The Plaintiff class, as certified by the District Court, consists of all handicapped persons in need of group, residential, rehabilitative services in the City of Pittsburgh (77a (referring to p. 77 of the Appendix filed with the Court of Appeals)). A sub-class of such persons who are recovering alcoholics was also certified (77a). The named Plaintiffs consist of persons who reside or desire to reside in facilities operated in the City of Pittsburgh by ARC (the Alcoholic Recovery Center, Inc.) (8a, 9a).[1]

Over and above the City's actions in denying ARC's applications for zoning approval in November, 1983 (F-30) and May, 1985 (F-43) (the latter decision was not formally effective until June 6, 1985 (1124-27a)), the City

[1] Subsequent to the filing of the Complaint ARC moved to intervene. This motion was granted at the time the preliminary injunction was issued. In addition, the City joined the County of Allegheny, Pennsylvania and the Allegheny County Institution District as Third Party Defendants. The County did not appeal the issuance of the preliminary injunction nor take part in the appeal before the Court of Appeals.

violated the Plaintiffs' civil rights by adopting a moratorium on the approval of any additional group homes in Pittsburgh (F-25), by denying building permits necessary to correct dangerous conditions in the facilities they already occupied (F-16, 86, 95, 96), and by withholding Community Development Block Grant assistance for needed renovations and/or relocation due to the presence of community opposition (F-34-36, 45, 46, 49, 53). The May, 1985 zoning denial, based on a wholly pretextual recitation of zoning considerations, was merely the latest action taken in furtherance of a July, 1983 resolution by the City to deny group homes where there was community opposition (F-43, 44, 58, 92 and Conclusion of Law 15). This final step in May, 1985 threatened to add 27 desperate, handicapped persons to those already on the streets as a result of the City's actions (F-3, 64, 81). Substantial harm to these individuals and the community was likely (F-3, 64, 81, 83, 84). The City's characterization of this suit, as simply an appeal from an administrative zoning decision, is inaccurate.

Summary of the Argument

The Petition for Writ of Certiorari should be denied for the following reasons.

A. There is no conflict among the Circuit Courts of Appeals with respect to the propriety of federal court jurisdiction over §1983 actions. The availability of adequate state judicial remedies is not relevant to §1983 jurisdiction. State administrative actions which involve zoning denials may raise substantive constitutional and federal statutory violations for which §1983 provides a remedy. The Plaintiffs have asserted claims under the Fourteenth Amendment Equal Protection Clause and Section 504 of the Rehabilitation Act of 1973. This Court's ruling in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), that in certain instances state post-deprivation judicial remedies must be considered before a procedural due process claim is made out, is inapplicable.

B. This Court's reasons for determining in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985) that a single, uniform statute of limitations period best meets Congressional objectives in enacting the Civil Rights Act of 1871, fully apply in the instant case. The City has presented no reason to reconsider this decision.

C. Younger abstention is not called for in the present case for a number of reasons. Plaintiffs have not been a party to any state administrative or judicial proceeding. The pending state proceeding involving the federal Intervenor ARC was initiated by ARC to obtain remedial action from the City. That state proceeding does not provide an adequate opportunity to raise the federal claims raised herein. Proceedings of substance in the District Court had already occurred at the time the state court proceeding was initiated. This federal action was

necessary to protect important constitutional rights and prevent irreparable injury. The District Court was never asked to nor has it interfered with the state proceeding. The abstention decisions of this Court have been correctly followed by the Courts below.

D. The Courts below, in determining that Plaintiffs have standing to proceed in this matter, have correctly followed the decisions of this Court. The Plaintiffs have averred and demonstrated that actions by the City have caused them and threaten to cause them actual harm, and that the federal rights asserted are their own, not those of a third party or those shared by the public generally. Federal, not state, law determines who has standing to proceed in federal court. A state cannot frustrate the purposes to be served by the Fourteenth Amendment and the Civil Rights Act of 1871 by placing limits on who can seek relief from an unconstitutional zoning decision.

ARGUMENT

A. There is no conflict in the decisions of the Circuit Courts of Appeals with respect to the availability of Section 1983 to remedy federal constitutional and statutory violations of the nature raised in the present case.

The City cites a number of decisions rendered by the First, Second, and Seventh Circuits, contending that they cannot be reconciled with the decision of the Third Circuit in the present case. On the contrary, these decisions are fully consistent with one another, as they are with the controlling precedents of this Court.

The Court of Appeals determined that Plaintiffs had demonstrated violations by the City of their rights under

the Fourteenth Amendment's Equal Protection Clause and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. These violations consisted of actions by the City in denying to handicapped persons the opportunity to maintain and obtain essential group, residential, rehabilitative services in the City due to their handicap and due to community opposition based on their handicap. The City's actions were not related to any legitimate governmental interest. Instead, the City openly carried out a policy of deferring to the unfounded prejudice of community residents in denying to the Plaintiff class the opportunity to realize the equal protection of the laws, including federally funded programs designed to assist their integration into the community.

A brief analysis of the decisions of the First, Second and Seventh Circuits cited by the City discloses that these decisions do not conflict with the conclusions reached by the Third Circuit in the present case. In general these Circuit decisions correctly rely, in whole or in part, on this Court's opinions in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976) and *Parratt v. Taylor*, *supra*.

In *Paul v. Davis*, this Court held that not every violation of state law makes out a federal constitutional claim. Instead, only those acts under color of state law which violate a specific right secured by the Constitution may be remedied through the Fourteenth Amendment and §1983. In *Parratt v. Taylor*, this Court held that where it is impractical for a state to provide procedural protections prior to the deprivation of a protected property interest, it becomes necessary to consider the adequacy of post-deprivation procedures, including state judicial procedures, before determining that there has

been a violation of procedural due process. This Court in *Paul v. Davis*, was, thus, concerned with what constitutes a Constitutional deprivation in general, while in *Parratt* the Court addressed that which constitutes a procedural due process violation.

The First Circuit in *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) followed *Paul v. Davis* in holding that a due process violation is not made out where there is a mere allegation of violation of state law and the state judiciary is available to remedy this. The Court was careful to point out that a deprivation of a specific Constitutional right was not stated. *Id.* at 1527. The Court distinguished the case before it from those presented to it in *Packish v. McMurtrie*, 697 F.2d 23 (1st Cir. 1983), *Manego v. Cape Code Five Cents Bank*, 692 F.2d 174 (1st Cir. 1982) and *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983). In each of these cases the violation of specific Constitutional rights was alleged: retaliation for the exercise of First Amendment rights (*Packish*); denial of equal protection due to discrimination based on race (*Manego*); and denial of due process (*Roy*).

The other First Circuit cases cited by the City expressly followed *Chiplin*, or were "essentially identical" to it. (*Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982)) *Chiplin*, 712 F.2d at 1527.

In the present case, the Plaintiffs did state and prove the violation of specific Constitutional rights, equal protection and substantive due process, in addition to a violation of Section 504 of the Rehabilitation Act of 1973. Plaintiffs were not attempting to bootstrap mere state law violations by local officials into federal

Constitutional claims. The City deliberately denied a segment of its population equal status under the law. There can be no question that this case is substantially different from *Chiplin* where an equal protection claim was expressly held not to have been stated. As is clear from *Chiplin* and *Manego*, the First Circuit was not holding that a plaintiff must first exhaust state judicial remedies before seeking to assert a federal court's jurisdiction to hear an equal protection claim. To do so would have been contrary to Congressional intent in enacting 42 U.S.C. §1983, as determined by this Court in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961) and *Patsy v. Fla. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

The Second Circuit in *Yale Auto Parts v. Johnson*, 758 F.2d 54 (2d Cir. 1985) and the Seventh Circuit in *Albery v. Reddig*, 718 F.2d 245 (7th Cir. 1983) also did no more than hold that a violation of state law in applying a local ordinance did not in itself make out a constitutional violation.

In *Yale*, the Court concluded that the plaintiff therein did not have a constitutionally protected property interest in the permit he sought. Instead he had a unilateral expectation in the permit, which was insufficient. The court distinguished cases where the locality had previously permitted or acquiesced in a particular use and was later acting to deny it. *Id.* 758 F.2d at 60 n. 9. Since there was no protected property interest, the fairness of the procedures afforded was irrelevant. The Court also expressly determined that there was no equal protection claim established since there was no allegation that the plaintiff was treated differently from others.

In *Albery*, the Court first rejected the plaintiffs' procedural due process claims under *Parratt*, since at most the defendant building inspector was negligent in failing to follow proper procedures and a state court remedy was available. The Court then examined whether an alleged error in applying a certain measurement standard for residential garage height constituted a substantive due process violation. The Court stated:

> To prevail on this theory, plaintiffs must allege and prove that the Zoning Ordinance or the Uniform Building Code (or whatever other legislative enactment may be controlling here) is arbitrary and unreasonable or that its application bears no substantial relation to the public health, safety or morals. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Albery, 718 F.2d at 251. The Court concluded that there was no substantive due process violation because the measurement standard itself was not unreasonable. Whether it was the correct standard to apply was a matter of state law, to be decided in state court.

Again, the decisions in *Yale* and *Albery* are easily reconciled with the present case. Most significant is that Plaintiffs herein claimed violations of substantive Constitutional rights, specifically equal protection and substantive due process. The District Court found a violation of both (Conclusion of Law 23 and 24), although the Court of Appeals in affirming only reached the equal protection claim and the Section 504 claim. A violation of procedural due process was not claimed herein.

Plaintiffs not only demonstrated that the City applied its zoning ordinance in a manner which bore no relation

to the public health, safety or morals, but in addition demonstrated that the City's reference to this ordinance was a pretext for a policy of denying group homes for the handicapped in need of rehabilitative services whenever a segment of the surrounding community voiced its objection. The City announced a predisposition to turn down all such applications due to community opposition and thus chilled the exercise of constitutional rights of those in need of such facilities and organizations, such as ARC, which were created to meet the needs of handicapped persons (Conclusion of Law 7). Even if a case by case appeal to the state's judiciary could address such fundamentally unfair and discriminatory treatment, it is clear that neither the cases cited by the City nor the decisions of this Court have required this.

The decision of this Court in *Parratt v. Taylor* does not apply to substantive due process or equal protection violations, or other substantive violations of the Constitution or federal law, such as the Rehabilitation Act of 1973. *Parratt v. Taylor* determined that in those circumstances where it is not practicable for the state to provide a meaningful pre-deprivation proceeding, the state action is not "complete" for procedural due process violation purposes at the point of the deprivation. Post-deprivation remedies must also be considered. *Id.* 451 U.S. at 542, 101 S.Ct. at 1916. Due to the random and unauthorized nature of the action challenged in *Parratt*, action which constituted a tort under state law, the Court held that it must decide whether the state's post deprivation tort remedies "satisfy the requirements of procedural due process". *Id.* 451 U.S. at 537, 101 S.Ct. at 1914.

On the other hand, a substantive due process violation is "complete as soon as the prohibited action is taken". *Daniels v. Williams*, _____ U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), *Davidson v. Cannon*, _____ U.S. _____, 106 S.Ct. 668 (1986), concurring opinion of Justice Stevens, 106 S.Ct. at 678. The federal Constitution prohibits a state from taking action violative of substantive due process "regardless of the fairness of the procedures used to implement them". *Id.* quoting from the majority opinion of Justice Rehnquist in *Daniels v. Williams, supra*, 106 S.Ct. at 665. "[T]he independent federal remedy is then authorized by the language and legislative history of §1983." *Id.* 106 S.Ct. at 678. See also the concurring opinion of Justice Blackmun in *Parratt*, 451 U.S. at 545, 101 S.Ct. at 1918:

> [T]here are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 137 (1973).

The Courts of Appeals have also uniformly interpreted *Parratt* as not applying to substantive constitutional claims. See *Littlefield v. City of Afton*, 785 F.2d 596, 607-8 (8th Cir. 1986), and *Morello v. James*, 810 F.2d 344, 348 (2d Cir. 1987) and the cases cited therein.

The decisions of the Courts below in the present case are fully supported by and in fact required by this Court's ruling in *Cleburne v. Cleburne Living Center*, _____ U.S. _____, 105 S.Ct. 3249 (1985). *Cleburne* is virtually indistinguishable from the present case. Each involved a determination that the respective Cities violated the equal protection clause in *applying* their

zoning ordinances in the context of the applications for group home approval before them (*Cleburne*, 105 S.Ct. at 3259-60; Conclusion of Law 23, 620 F.Supp. at 945, 811 F.2d at 9). Neither this Court in *Cleburne* nor the District Court in the present case determined that the ordinances themselves were facially unconstitutional (*Cleburne*, 105 S.Ct. at 3258; Conclusion of Law 30).

Even if relevant, the City's attempt to distinguish *Cleburne* on the ground that the zoning denial in *Cleburne* was not subject to state judicial review, is without support. The cases relied on, *Sherwood Lanes, Inc. v. City of San Angelo*, 511 S.W.2d 597 (Ct. of Civil Appeals of Texas 1974) and *Marriott v. City of Dallas*, 644 S.W.2d 469 (Texas 1983), do not support the City's assertion. Instead, each case *involves* judicial review of the reasonableness of a zoning ordinance's special use permit requirement and its application to the particular facts arising therein. *Sherwood Lanes, Inc.*, 511 S.W.2d at 599, 600, *Marriott*, 644 S.W.2d at 471, 473. See also *City of Amarillo v. Stapf*, 101 S.W.2d 229, 233 (Op. of Commission of Appeals of Texas adopted by the Texas Sup. Ct., 1937) (An owner of property is entitled to direct access to the courts for the purpose of litigating whether a zoning ordinance is unreasonable, arbitrary or discriminatory regardless of whether the ordinance has made provision for it) and *City of College Station v. Turtle Rock Corp.*, 680 S.W. 2d 802, 806 (Texas 1984) (holding that the zoning ordinance under review was not arbitrary or unreasonable on its face, and remanding for a determination of reasonableness in the particular application raised therein).

The Courts of Appeals should be and have been diligent in following this Court's directions in determining that which constitutes a federal

Constitutional deprivation. Though the contours of a substantive due process claim are not as readily discernible as are other substantive Constitutional claims, the Court of Appeals in the present case did not need to and in fact did not reach this claim. The Third Circuit held that the claims based on the Rehabilitation Act of 1973 and the Equal Protection Clause fully supported the District Court's ruling. Thus, even if there is a disagreement among the Circuits as to what constitutes a substantive due process claim, and as set out above Plaintiffs do not believe that there is, this is not the appropriate case to reconcile such disagreement, since the Court of Appeals did not even reach that claim in this case.

B. The present case does not call for reconsideration of this Court's recent decision in *Wilson v. Garcia*, _____ U.S. _____, 105 S.Ct. 1938 (1985).

This Court in *Wilson v. Garcia, supra*, determined that the "federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored" the selection of the single most appropriate statute of limitations for all §1983 claims. *Id.* 105 S.Ct. at 1947. The Court further held that the nature of the §1983 remedy, and the historical context in which this section was enacted, support the limitation period applicable in each state to the recovery of damages for personal injuries as the most appropriate statute of limitations. *Id.* 105 S.Ct. at 1947, 1948. In doing so the Court recognized that any analogies to state statutory or common law remedies are bound to be imperfect. *Id.* 105 S.Ct. at 1945.

This case presents no reason to reconsider this decision. The essential nature of a §1983 claim is not which state official or entity causes the violation, but the

violation of the personal right itself. The City would not merely have this Court sanction different treatment of an equal protection claim from a false imprisonment claim, for example. Instead the City asks that equal protection violations by local agencies be treated differently than equal protection violations by other state officials. This Court in *Wilson* specifically rejected the adoption of a state limitation period based on the identity of the alleged wrongdoer. *Id.* 105 S.Ct. at 1949. To do so would run the risk that the limitation period would not serve the federal interests vindicated by §1983.

The instant case presents a prime example of how the federal interests would not be served by the adoption of the 30 day limitation period sought by the City. Uncertainty would result when actions are brought against both local agencies or governmental bodies and individual officials. Litigation would ensue over which state bodies or officials merit different treatment and which do not. The remedial purpose of §1983 would be frustrated, because 30 days in most cases is an insufficient period of time for the person harmed to take mental and emotional account of what has occurred, and then to seek and obtain legal representation, over and above the time required for the attorney to adequately investigate the matter and prepare a proper complaint. Actions may be brought, which otherwise may not, given that suits must be rushed into. There would be no time to negotiate a resolution of claims without litigation, and that would unnecessarily consume judicial resources.

The interests sought to be protected by the City in its Petition are not present in this case. This case does not involve unpaid volunteers who have rendered a routine zoning decision. Rather, this action was brought against

paid policy-making and supervisory-level officials, whose zoning decisions were but a part of a deliberate City policy to prevent a class of handicapped citizens from enjoying their rightful place within the community.

Lastly, even if the appeal period from an adverse administrative decision was adopted as the appropriate federal §1983 limitation period, this would be of no avail to the City in the present case. The City has contended that the May 22, 1985 filing of the Complaint in this action should not be timely as to the November 21, 1983 zoning denial. The City does not question the timeliness of Plaintiff's claims arising from the May 20, 1985 zoning denial.

Pennsylvania law provides that for an agency adjudication to be valid, there must be an opportunity for a hearing and the decision must be accompanied by findings and reasons. 2 PA. CONS. STAT. ANN. §§553, 555 (Purdon Supp. 1987). The City's November 21, 1983 action was taken without a hearing and without findings and reasons (F-30). Thus, even though this action effectively denied ARC zoning approval and building permits, it was not a valid agency action subject to appeal within 30 days under state law. See for example *Callahan v. Pennsylvania State Police*, 494 Pa. 461, 431 A.2d 946, 948 (1981) (Adjudication was invalid since there was no opportunity for a hearing. The 30 day period in which to appeal was applicable to valid adjudications only).

C. The District Court, as affirmed by the Court of Appeals, correctly followed the decisions of this Court in refusing to abstain.

The City wrongly contends that this Court's decisions in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281 (1975) and *Ohio Civil Rights Commission v. Dayton Christian Schools*, _____ U.S. _____, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) require abstention in the present case.

In July, 1983, the City established a policy to deny group home occupation where there is community opposition. The Plaintiffs commenced this action on May 22, 1985 following a decision by the City to continue to adhere to that policy. Prior to July, 1983 the City had approved 16 of 17 group home applications. Following its July 1983 moratorium the City approved only one of ten (F-42, 43). The lone approval granted an application to *reduce* the number of residents in an existing home from more than 100 to 20. There was no community opposition to this application (F-44). Consistent with this moratorium, the City decided against spending federal Community Development Block Grant funds to assist group homes for the handicapped if there was community opposition presented (F-36, 45, 46, 53, 54).

On May 22, 1987 there were no pending administrative or judicial proceedings which dealt with the above described actions of the City. Although ARC had available to it an appeal from the City's May 20, 1985 denial of its application to continue to operate the facility at 800 E. Ohio Street, ARC had not appealed when Plaintiffs filed their District Court action (169a). The residents of 800 E. Ohio Street were in immediate danger of being put on the street without necessary

treatment. Numerous other handicapped persons were already on the street or otherwise without necessary community residential treatment, due to prior actions of the City (F-80).

The Plaintiffs sought a temporary restraining order and preliminary injunction to prevent immediate, irreparable harm of a substantial nature. The City agreed not to close the 800 E. Ohio Street facility until the preliminary injunction motion was decided. A preliminary injunction trial commenced on June 3, 1985 and continued over four days. In addition to seeking to enjoin the City from closing 800 E. Ohio Street, the Plaintiffs sought an order permitting them to reoccupy a second facility, 1216 Middle Street (which had been recently closed at the City's direction) and the expenditure of certain Community Development Block Grant funds which had been committed to do necessary repairs to the 800 E. Ohio Street facility but were not paid due to community opposition. At the commencement of this trial ARC moved to intervene as a plaintiff. The Court took this motion under advisement but permitted ARC to participate in the trial.

In addition to the preliminary injunction trial, the Court held five conferences between the parties, viewed the premises in question, and considered multiple briefs and post-trial factual submissions. Following the preliminary injunction trial, but before the issuance of this injunction, ARC appealed the May 20, 1985 zoning decision to the state Court of Common Pleas. In issuing the preliminary injunction the District Court permitted ARC's intervention. The District Court was neither asked to nor did it enjoin the state court appeal.

Dayton Christian Schools does not require the application of the *Younger* abstention doctrine for a number of reasons. First, unlike *Dayton*, the federal court plaintiffs are not a party to any state proceeding, administrative or judicial. Nor can the fact that the Plaintiffs' interests are somewhat related to ARC's impair their right to proceed in federal court. As noted by the Court below, the relationship between the Plaintiffs and ARC is similar to the relationship between the patient and treating physician in *Roe v. Wade, supra*, and unlike the employer-employee relationship in *Hicks v. Miranda, supra*. There can be little question that the Plaintiffs, most of whom are not even ARC residents, do not exercise control over this organization, particularly when contrasted with the control that an employer exercises over an employee. In *Hicks*, the employer and employee were represented by the same attorney. The employer in federal court sought to enjoin the state proceeding against the employee, and sought the return of its property that had been taken in the course of the state proceeding against the employee. The nexus referred to by this Court in *Doran v. Salem Inn*, 422 U.S. 922, 929, 95 S.Ct. 2561, 2566 (1975), that the federal plaintiff be closely related to the state defendants "in terms of ownership, control and management", is not approached in the present case.

Since the Plaintiffs have not been parties to the state proceeding, the adjudication of the merits of their federal claims in federal court creates no presumption of state adjudicative inadequacy. There is absolutely no indication that their effort to obtain federal court relief was in any way a sham to avoid any abstention theory applicable to ARC. As will be discussed *infra*, the Plaintiffs had standing to seek the District Court's relief in their own right.

Second, the state administrative proceeding that had been conducted (to obtain zoning approval for 800 E. Ohio Street) was a remedial action brought by ARC, not a coercive action brought by the state. As implicitly noted in *Dayton*, to apply abstention in this instance, even if Plaintiffs were a party to the State proceeding, would be to effectively overturn this Court's decision in *Patsy v. Board of Regents, supra. Patsy* reaffirmed that Congress had not intended that state administrative or judicial remedies be exhausted before bringing a §1983 action in federal court. To require abstention whenever remedial action has been sought from a state administrative body would effectively impose an exhaustion requirement because it is usually necessary to initiate such an administrative proceeding to obtain any action at all from the agency.

Third, unlike *Dayton, Hicks* and *Younger* there has been no request in the present case to enjoin any state proceeding, administrative or judicial. The District Court was not asked to, nor did it interfere in any way with the state proceeding available as a matter of right to ARC (but not to Plaintiffs) to object to the May 20, 1985, 800 E. Ohio Street zoning denial on state law grounds.

Fourth, again unlike *Dayton, Hicks* and *Younger*, proceedings of substance had occurred in the District Court at the time ARC took its appeal in state court. The District Court had devoted considerable resources, including a four day trial, in response to Plaintiffs' motion raising the threat of imminent, irreparable harm absent relief *pendente lite*. "[C]onsiderations of economy, equity, and federalism counsel against *Younger* abstention" at this point simply because a potential intervenor before it has commenced a state court proceeding. *Cf. Hawaii Housing Authority v. Madkiff*, 467 U.S. 229, 238, 104 S.Ct. 2321, 2328 (1984).

Fifth, the state court proceeding which was commenced did not provide Plaintiffs with an adequate opportunity to raise their federal claims, even if the Plaintiffs had been a party to this proceeding. As noted by the Court below "abstention is not warranted, in part because state action over a period of time affecting more than one treatment unit may be challenged in the federal proceeding but not in the state proceeding." *Sullivan, et al. v. City of Pittsburgh, et al.*, 811 F.2d at 178 n.6. While ARC could challenge the May 20, 1985 decision denying zoning approval for 800 E. Ohio Street, it could not raise in that appeal the City's prior actions in denying zoning approval to 1216 Middle Street and in withholding community development funds committed to and admittedly needed to correct dangerous conditions existing in the 800 E. Ohio Street facility.

This Court has repeatedly held that even where abstention is otherwise required, it is not called for in those extraordinary circumstances where federal court intervention is needed to prevent irreparable injury. *Younger*, 401 U.S. at 53, 91 S.Ct. at 755. See also the decisions of this Court cited by the Court below (*Sullivan*, 811 F.2d at 179). In these circumstances, the interests of federalism and comity cannot impede the exercise of federal court jurisdiction to safeguard the substantial rights intended to be protected by §1983.

In the present case, there was no provision for state court preliminary injunctive relief as part of ARC's appeal of the 800 E. Ohio Street decision. Even if there was, that would be inadequate to protect the numerous handicapped persons who were exposed to irreparable injury including death, due to ARC's inability to occupy 1216 Middle Street and due to its inability to utilize the federal funds committed to carry out necessary repairs of

dangerous conditions at 800 E. Ohio Street. As concluded by the Court below "it is difficult to conceive of many facts which would more compellingly argue for appellees' relief" (811 F.2d at 180).

For the above reasons, the determination of the District Court and the Court of Appeals not to abstain in the present case is fully consistent with the rulings of this Court.

D. The District Court as affirmed by the Court of Appeals correctly followed the decisions of this Court in determining that Plaintiffs had standing.

The City's proposition that federal court standing in a §1983 action is dependent on state law, which determines who may and who may not seek relief in state court, could not be more antithetical to the purposes underlying the adoption of the Fourteenth Amendment and enactment of §1983. Assuming the accuracy of the Pennsylvania restrictions on standing as put forth by the City, it was just that sort of inadequate state remedy that Congress intended to overcome through §1983, by providing a federal forum to vindicate important federal rights. *Patsy v. Florida Board of Regents, supra.*

Whereas state law may be relevant in determining when there is a property interest, the deprivation of which calls into play procedural due process protections, the Plaintiffs have not claimed that their procedural due process rights have been violated in the present case. Plaintiffs seek relief from invidious discrimination which has violated both their rights to equal protection under the Fourteenth Amendment, and their rights to take part on an equal basis in programs assisted with federal funds as guaranteed by the Rehabilitation Act of 1973. Standing to so proceed in federal court is determined by federal, not state, law.

The Court below correctly applied this Court's decision in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 (1975). *Sullivan*, 811 F.2d at 175-76. Plaintiffs established an actual injury traceable to the conduct of the City sought to be enjoined. They asserted their own rights, not the rights of third parties or the public generally. See also *Village of Arlington Heights v. Metro. Housing Development*, 429 U.S. 252, 97 S.Ct. 555 (1977) (Plaintiff, an individual likely to reside in the specific project subject to the zoning denial, has adequately averred an actionable causal relationship between the zoning practices and his asserted injury, and thus has standing).

Plaintiffs in the present case have not only averred that they would reside in the specific project subject to the zoning denial, but many have already been residing and receiving necessary rehabilitative services there. The zoning denial threatened to put them or leave them on the street without treatment and subject to severe physical and psychological damage. This Court in *Warth* specifically noted that it is not necessary that a plaintiff have a contractual interest in a particular project to challenge the zoning practice. *Warth*, 422 U.S. at 508, 95 S.Ct. at 2210, n. 18.

The City's speculation about "what if" ARC decided against continuing to operate the facilities in question is not relevant in the present case since it has been clearly demonstrated that ARC does intend to continue to operate. Plaintiffs contend that when challenged state action has had a chilling effect on decisions to operate necessary facilities in a given locality, and even caused such organizations to discontinue existing operations, the state action may be challenged without the direct participation of the organizations. The District Court

found that the City's actions had this result. (F-31, 91, 92, Conclusions of Law 7). However, the Courts below did not reach this issue, and this Court need not, because ARC's continued intention to operate these facilities is not in question.

Conclusion

For the reasons set forth above, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted:

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